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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MANNON DUPREE MILLER,

Defendant and Appellant.

G041850

(Super. Ct. No. FWV700252)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Ingrid Adamson Uhler, Judge. Affirmed.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant
Attorney General, Peter Quon, Jr., and Marvin E. Mizell, Deputy Attorneys General, for
Plaintiff and Respondent.

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INTRODUCTION

Defendant Mannon Dupree Miller was convicted of carrying a concealed dirk or dagger. The jury found true an allegation that the crime was committed for the benefit of a criminal street gang. Defendant challenges the true finding on the gang enhancement allegation on multiple grounds. We reject each challenge, and therefore affirm.

First, defendant contends there was not substantial evidence to support the finding. We disagree.

Second, defendant argues the trial court abused its discretion by permitting the gang expert witness to offer his opinion on an ultimate issue in the case—whether defendant committed the crime of carrying a concealed dirk or dagger with the intent to benefit a criminal street gang. Defendant, however, did not object to the expert’s opinion in the trial court, and has therefore forfeited the argument on appeal.

Third, defendant argues the trial court erred by instructing the jury that the prosecution did not need to prove motive, because the prosecution was required to prove defendant’s specific intent regarding the gang enhancement allegation. Motive and intent are two different things, and the court did not err in its instructions on these two separate matters.

Fourth, defendant argues the prosecutor committed misconduct during closing argument by attempting to incite the jury’s passions. Defendant’s trial counsel objected to the argument, but refused the trial court’s offer to admonish the jury after counsel’s motion for a mistrial was denied. Defendant has therefore forfeited the issue on appeal. Even if the issue had not been forfeited, we would conclude defendant has failed to establish prejudicial error.

Finally, defendant cannot prevail on his claim of cumulative error. As will be shown, either there was no error, or any potential claim of error was not prejudicial or was forfeited.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

About 6:30 p.m. on February 24, 2007, a fight broke out between defendant and another African-American man at the Ontario Mills mall. Defendant and the other man were exchanging punches; defendant did not have a knife in his hands. Matthew Herbstritt, a bystander, pulled defendant off the other man, ending the fight. As Herbstritt tried to calm him down, defendant pushed Herbstritt in the chest, and asked, “[w]ho the fuck are you?” Defendant took off his white T-shirt, and wrapped it around his left hand and wrist.

In the meantime, the man with whom defendant had been fighting and two other African-American men ran out of the mall. Defendant yelled after them, “[f]uck you, nigga,” referred to himself as a “Crip,” and made other references to Crips. A mall security guard saw a knife in defendant’s left hand. Defendant then turned toward Herbstritt, swinging his left hand. Herbstritt put his hands up, and felt his finger “poked with something.” Herbstritt said to the mall security guards, “[h]ey, he’s got a knife in his hand.”

The police arriving on the scene saw a knife in defendant’s left hand. After defendant was arrested, he admitted being a member of the Grape Street Watts gang, and stated he had been jumped by members of the Bloods gang at the mall because they recognized him.

Los Angeles Police Officer Jason Archie testified at trial as a gang expert for the prosecution. Officer Archie testified about gangs in general, and about the Grape Street Crip criminal street gang in particular. He opined that defendant was a Grape Street Crip member. Officer Archie also opined that publically identifying himself as a gang member during a fight in a public place would benefit defendant and his gang, because it “creates an atmosphere of fear and intimidation throughout the community when people yell out their gang . . . names, so it would tend to have people leave that guy alone.” Officer Archie testified Grape Street Crip gang members “carry knives all the

time,” and it would benefit the entire gang for a gang member to be seen carrying a knife in a mall after a fight and yelling out the gang name, as that would enhance the gang’s reputation with the public. Assaulting a nongang member after claiming to be a gang member would also enhance the gang’s reputation and defendant’s own reputation within the gang. Ultimately, Officer Archie opined defendant committed the assault on Herbstritt and concealed the knife for the benefit of the Grape Street Crip gang.

Defendant was charged in an information with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1) [count 1]), and carrying a concealed dirk or dagger (*id.*, § 12020, subd. (a)(4) [count 2]). The information alleged both crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Id.*, § 186.22, subd. (b).) The information also alleged defendant had a prior felony conviction (*id.*, §§ 667, subd. (b), 1170.12, subd. (a)), and was on a grant of felony probation at the time the crimes were committed (*id.*, § 12022.1, subd. (f)). A jury convicted defendant on count 2, and found the gang enhancement allegation true as to that count. The jury could not reach a verdict on count 1, and the court declared a mistrial.

In a bifurcated proceeding, defendant admitted the prior conviction allegation. The trial court struck the special allegation of defendant’s probation status. The court sentenced defendant to a total of seven years in prison: the two-year midterm sentence on count 2, doubled because it was a second strike, plus a consecutive three-year midterm sentence on the gang enhancement. Defendant timely appealed.

DISCUSSION

I.

SUBSTANTIAL EVIDENCE REGARDING GANG ENHANCEMENT

Defendant argues there was insufficient evidence that he carried a concealed dirk or dagger with the specific intent to promote, further, or assist in the

criminal conduct of gang members. “‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “‘upon no hypothesis whatever is there sufficient substantial evidence to support’” the conviction or the enhancement. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant did not commit the crime of carrying a concealed dirk or dagger until the blade of his pocketknife was exposed and locked into place. (Pen. Code, § 12020, subd. (c)(24); *In re George W.* (1998) 68 Cal.App.4th 1208, 1214.) The Attorney General and defendant agree that Penal Code section 12020, subdivision (c)(24) was not violated until after the fistfight ended, at the point when defendant wrapped his T-shirt around his left hand and wrist, concealing the open blade of the pocketknife. There was substantial evidence that, *after* defendant did so, he yelled out references to the Crips gang. The gang expert testified that in his opinion, carrying a pocketknife in this manner would benefit defendant’s gang by enhancing the gang’s reputation for carrying weapons and being willing to use them. From this evidence, the jury could reasonably infer defendant carried a concealed dirk or dagger with the specific intent to benefit a criminal street gang. We therefore affirm the true finding on the gang enhancement allegation.

II.

GANG EXPERT’S TESTIMONY

Defendant also argues the true finding on the gang enhancement allegation must be reversed because the prosecution’s gang expert was permitted to offer his

opinion that the crime of carrying a concealed dirk or dagger was committed with the intent to benefit a criminal street gang. At trial, Officer Archie testified as follows.

“Q And you’ve reviewed the facts of this case. Do you believe that the defendant committed these assaults—this assault with a deadly weapon and carrying the concealed dirk or dagger for the benefit of the criminal street gang Grape Street Crips?

“A Yes, absolutely.

“Q Why?

“A Because he yelled it out in a crowded place. He wanted everyone to know who he’s aligned with, Grape Street, and he also produced a weapon for everyone to see that he has a weapon and that he used the weapon so everyone could see that he’s not afraid to use it. So not only does it enhance his reputation because he could go back and brag about it, but all the other people in the mall that saw this would be like, you know, ‘Oh, these Crips are crazy,’ he has a knife while walking around in the mall. It enhances the gang’s reputation as well.”

There were no objections to this testimony in the trial court on the ground now asserted on appeal. The admissibility of gang expert opinion is largely discretionary with the trial court. (See, e.g., *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657.) Because defendant’s trial counsel failed to object to the expert opinion testimony, the trial court had no chance to consider whether the evidence properly should have been excluded for the reason now advanced on appeal. Nor did the prosecutor have the opportunity to correct any defect in the way in which she framed her questions to the expert. We conclude the argument has been forfeited. (*People v. Ward* (2005) 36 Cal.4th 186, 211.)

Defendant argues that his counsel did object to the gang expert’s testimony. We disagree. At the preliminary hearing, defendant’s counsel moved to strike the gang expert’s opinion that Grape Street Crips was a criminal street gang, and defendant was a member of that gang, for lack of foundation, and based on an alleged violation of

defendant's rights under *Miranda v. Arizona* (1966) 384 U.S. 436. An evidentiary ruling by a different judge at a different hearing, *on a different issue* regarding the opinion of a different expert witness cannot bind the trial judge's discretion to admit or exclude evidence at trial. (See *People v. Williams* (1988) 44 Cal.3d 883, 912-913 [in limine ruling on admissibility of evidence does not bind the court if the evidence is introduced at trial].)

At trial, defendant's counsel's objection to other testimony by the gang expert on the ground that the expert was testifying to an ultimate issue—defendant's gang membership—was overruled. (The expert's opinion was based, in part, on defendant's own admission, after his arrest, that he was a member of the Grape Street Watts criminal street gang.) We reject defendant's argument that this objection applied to all of the gang expert's testimony. Defendant never objected based on the ground asserted on appeal—that the gang expert improperly testified defendant possessed specific intent. (*People v. Killebrew, supra*, 103 Cal.App.4th at pp. 656-658.)

Defendant also argues the trial court's admission of the gang expert's testimony rose to the level of a constitutional violation, and therefore can be raised as error for the first time on appeal. While it is true that “[n]ot all claims of error are prohibited in the absence of a timely objection in the trial court” (*People v. Vera* (1997) 15 Cal.4th 269, 276), defendant has not cited to, and we have not found during our independent research, any case holding the admission of expert testimony on an ultimate issue in the case is a “deprivation of certain fundamental, constitutional rights” (*ibid*).

III.

CALCRIM No. 370

Defendant also argues the trial court erred by instructing the jury with CALCRIM No. 370, regarding motive, without specifying the instruction did not apply to the gang enhancement allegation. CALCRIM No. 370, as given to the jury, reads as follows: “The People are not required to prove that the defendant had a motive to

commit any of the crimes charged. In reaching your verdict, you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.” Initially, we note that CALCRIM No. 370 by its terms applies to “the crimes charged,” not to gang enhancement allegations.

The recent case of *People v. Fuentes* (2009) 171 Cal.App.4th 1133 (*Fuentes*) rejected the same argument made by defendant. In *Fuentes*, the defendant was charged with murder, attempted murder, assault, street terrorism, and various other crimes involving the use of a firearm. (*Id.* at pp. 1136-1137.) Gang enhancements under Penal Code section 186.22, subdivision (b)(1) were alleged with respect to all charged crimes (except street terrorism). (*Fuentes, supra*, at pp. 1136-1137.) The trial court instructed the jury with CALCRIM No. 370, using the same language quoted *ante*. (*Fuentes, supra*, at p. 1139.) The defendant argued CALCRIM No. 370 contradicted the instruction for the gang enhancement allegations, which required the jury to determine whether the prosecution proved the defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang, and that the defendant *intended* to assist, further, or promote criminal conduct by gang members. (*Fuentes, supra*, at p. 1139.)

The appellate court stated: “An intent to further criminal gang activity is no more a ‘motive’ in legal terms than is any other specific intent. We do not call a premeditated murderer’s intent to kill a ‘motive,’ though his action is motivated by a desire to cause the victim’s death. Combined, the instructions here told the jury the prosecution must prove that [the defendant] intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it. [The defendant] claims the intent to further criminal gang activity should be deemed a motive, but he cites no authority for this position. There was no error. [¶] If [the defendant]’s argument has a superficial

attractiveness, it is because of the commonsense concept of a motive. Any reason for doing something can rightly be called a motive in common language, including—but not limited to—reasons that stand behind other reasons. For example, we could say that when A shot B, A was motivated by a wish to kill B, which in turn was motivated by a desire to receive an inheritance, which in turn was motivated by a plan to pay off a debt, which in turn was motivated by a plan to avoid the wrath of a creditor. That is why there is some plausibility in saying the intent to further gang activity is a motive for committing a murder: A wish to kill the victim was a reason for the shooting, and a wish to further gang activity stood behind that reason. The jury instructions given here, however, were well adapted to cope with the situation. By listing the various ‘intents’ the prosecution was required to prove (the intent to kill, the intent to further gang activity), while also saying the prosecution did not have to prove a motive, the instructions told the jury where to cut off the chain of reasons. This was done without saying anything that would confuse a reasonable juror.” (*Fuentes, supra*, 171 Cal.App.4th at pp. 1139-1140.) The jury here was instructed regarding the intent which the prosecution was required to prove to establish the truth of the gang enhancement allegation. The use of an instruction that the prosecution did not need to prove motive was not in error. We agree with the analysis in *Fuentes*.

The *Fuentes* court distinguished *People v. Maurer* (1995) 32 Cal.App.4th 1121, on which defendant in the present case also relies. “*People v. Maurer* . . . does not conflict with what we have said. *Maurer* held that the standard motive instruction was erroneous when given in conjunction with an instruction on [Penal Code] section 647.6, which prescribes punishment for ‘[e]very person who, motivated by an unnatural or abnormal sexual interest in children, engages in conduct with an adult whom he or she believes to be a child’ where the conduct would be an offense if the other person really were a child. Since this offense includes a ‘motivation’ as one of its elements, a jury naturally would be confused by an instruction saying the prosecution need not prove the

defendant's motive. Due to this peculiarity in the definition of the offense (. . .), the combination of instructions could not successfully tell the jury where to cut off the chain of reasons for the defendant's action which the prosecution had to prove. If section 647.6 referred to, say, persons acting 'with an intent to gratify an unnatural or abnormal sexual interest in children' instead of a motivation, the standard motive instruction would have been no more problematic than it is here." (*Fuentes, supra*, 171 Cal.App.4th at p. 1140.)

Motive and specific intent are not the same thing. "'Motive, intent, and malice—contrary to appellant's assumption—are separate and disparate mental states. The words are not synonyms. Their separate definitions were accurate and appropriate.' [Citation.] Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) There was no error in instructing the jury that the prosecution did not need to prove motive, while also instructing the jury that specific intent to assist, promote, or further criminal conduct by gang members must be proven.

It is not reasonably likely the jury misunderstood or misapplied CALCRIM No. 370. We reject defendant's claim to the contrary.

IV.

PROSECUTORIAL MISCONDUCT

Defendant also argues the prosecutor committed misconduct during closing argument by making an improper appeal to the jury's passion.

The prosecutor argued: "And that's what you have to look at as to how this benefitted the gang, because who is going to drop their kids off at the mall when this type of stuff is going on at the Ontario Mills Mall or at any mall or in Jordan Downs when these witnesses don't want to come forward. That's how it gets back to the gang. That's how it benefits the gang. Yelling Crip associates them with the gang. A fact that he is carrying a knife confirms that he is a violent gangster. Telling security guards to get the fuck back confirms he is hard core and he is an aggressor; and he is the aggressor in this

case. [¶] He could have stopped everything right there and then, but he didn't because he wanted to keep going because he wanted to get back to how this is going to benefit the gang, because he's willing to do whatever it is to make him look like a bad gangster. Slashing the victim who attempts to defuse the situation shows he will do anything to prove that. He is doing it in public, and it confirms that he wants others to know. It also benefits his reputation in the gang and benefits the gang's overall reputation in the community. [¶] This is an example of how gangs begin to control communities. Again, how uncomfortable would people feel dropping their children off where self-admitted gangsters hang out? This benefits the gang. How uncomfortable will people be dropping their kids off at the mall, when a Defendant, the Grape Street Crip member in this case is actually recognized and admits to deputies, I was recognized by other Bloods in the mall”

Defendant's counsel objected, and when the prosecutor concluded her argument, the following colloquy occurred outside the presence of the jury.

“[Defendant's counsel]: . . . I object specifically to the line of several statements that were made in reference to children being dropped off at the mall. I think it inappropriately appeals to instincts that are inappropriate in terms of what they need to consider in this case. It appeals to their passions. And I think it would ignite their prejudice when you're asking them how comfortable people feel dropping off their children. There is no indication that any children were threatened or that anybody was injured here. Based on that, I object and move for a mistrial.

“The Court: Your request for a mistrial – [¶] [Prosecutor], do you care to respond?

“[The prosecutor]: Well, there is some evidence that Mr. Herbstritt moved his own children down the hallway to avoid any further problems with them potentially getting in a fight. And there was evidence that there were people that were, at least I think it was, an arm's—a couple arm[s'] lengths away from the Defendant when he had a

knife in it, including not only children, but I think I asked specifically male and female. So there is evidence to support the inference, especially with the gang allegations, that it would benefit a criminal street gang under those circumstances.

“The Court: I think, [the prosecutor], in terms of including that in her Power Point was more for the gang enhancement, because, I believe, the extra witnesses did testify the reason for the association with the gang and for the purpose of associating [with] a gang is intimidation. And I think that was just a logical, reasonable argument. I don’t think it was in any attempt to ignite any type of prejudice or bias against the Defendant. And in that regard, your mistrial is not granted. If you want me to do an admonition in regard to the jurors, I can do that. Once again, I would indicate that they’re not to base any type [of] prejudice or bias or any type of emotional response. Strictly on the evidence. [¶] Your request for a mistrial is denied.

“[Defendant’s counsel]: Thank you, your Honor.

“The Court: So would you like me to do that admonition . . . or do you just want to let it go?

“[Defendant’s counsel]: I’ll let it stand as it is.”

A defendant forfeits a claim of prosecutorial misconduct on appeal unless he or she timely objects and requests that the jury be admonished to disregard the improper argument. (*People v. Ayala* (2000) 23 Cal.4th 225, 284.) Defendant’s counsel timely objected to the prosecutor’s argument, but refused an admonition. Defendant has therefore forfeited the issue on appeal.

Defendant argues that an admonition would not have cured the harm caused by the prosecutor’s misconduct, thereby excusing him from the forfeiture. He does not provide any specific explanation of how or why the admonition suggested by the trial court would have failed to cure the harm of the alleged misconduct. Defendant contends that any admonition “would have exacerbated the harm caused by the prosecutor’s misconduct” by emphasizing her statements. The trial court had suggested reminding the

jury it must base its decision on the evidence presented, not on any prejudice, bias, or emotional response. We do not see how such an admonition would have emphasized the prosecutor's allegedly improper comments.

This is not a case where any misconduct by the prosecutor was so pervasive as to create a poisonous trial atmosphere, or where the trial court had made it clear, through repeated denials of objections and criticism of defense counsel in front of the jury, that requesting an admonition would be futile, at best. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821.) Defendant therefore is not excused from the forfeiture of this argument on appeal.

Even if we were to reach the merits of this argument, we would conclude either there was no error or any error was not prejudicial. A prosecutor commits misconduct if he or she uses deceptive or reprehensible methods to attempt to persuade the trial court or the jury. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1124.) A prosecutor may vigorously argue the case, as long as he or she fairly comments on the evidence, including the reasonable inferences or deductions that may be drawn from the evidence. (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) The prosecutor's comment inferring that parents would be loath to drop their children off at the mall was a fair comment on, or inference to be drawn from, the evidence that the incident occurred at a busy mall on a Saturday evening and caused many bystanders to be stunned and frozen in place. Additionally, the comment was a fair comment on the gang expert's opinion that such conduct by defendant would be likely to enhance the gang's reputation and to create a general atmosphere of fear, keeping witnesses from calling the police.

Even if the prosecutor's comments were improper, they could not have prejudiced defendant. "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging

rather than the least damaging meaning from the prosecutor's statements. [Citation.]" [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) The prosecutor's comments were brief and isolated. Defendant has failed to make any showing that the jury understood or applied the prosecutor's comments improperly. If any misconduct occurred, it was harmless. The trial court did not err in denying defendant's request for a mistrial.

V.

CUMULATIVE ERROR

Finally, defendant argues the cumulative error of the admission of the gang expert's opinion, the instructional error, and the prosecutor's improper argument deprived him of a fair trial. As explained *ante*, there was no error, or any error was not prejudicial or has been forfeited. We therefore conclude there was no cumulative error.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.